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No. _____

In The

Supreme Court of the United States

RICHARD J. LAUGHNER,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Indiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a "double attempt" offense, such as the "attempted solicitation" of which Petitioner was convicted, violates due process.

2) Whether the offense of "attempted child solicitation using a computer network" is unconstitutionally vague and overbroad.

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OPINIONS BELOW

The opinion of the Indiana Court of Appeals in this case, *Laughner v. State of Indiana*, 769 N.E.2d 1147 (Ind. App. 2002), is reproduced as Appendix A to this Petition. The trial court's unpublished order imposing judgment appears as Appendix B. The Indiana Supreme Court's order denying transfer in this case is reproduced as Appendix C.

JURISDICTION

From the Indiana Court of Appeals' decision in this case, Petitioner timely sought rehearing (denied on August 9, 2002), and transfer to the Indiana Supreme Court (denied on October 31, 2002). Petitioner has therefore filed this Petition within 90 days of the final decision below, in compliance with Rule 13.1 of this Court. Under 28 U.S.C. § 1257(a), this Court has jurisdiction to review the decision below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amendment I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

United States Constitution, amendment V:

> No person shall be . . . deprived of life, liberty or property, without due process of law.

Indiana Code § 35-42-4-6 defined the offense of child solicitation at the time of the alleged offense in relevant part as follows:

> A person eighteen (18) years of age or older who knowingly or intentionally solicits a child under fourteen (14) years of age to engage in
>
> (1) sexual intercourse;
>
> (2) deviate sexual conduct; or
>
> (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person;
>
> commits child solicitation, a class D felony. However, the offense is a Class C felony if it is committed by using a computer network.

As amended in 2002, Ind. Code § 35-42-4-6 now includes legislative ratification of the offense of "attempted solicitation":

> (c) In a prosecution under this section, including a prosecution for attempted solicitation, the state is not required to prove that the person solicited the child to engage in [a sexual] act at some immediate time.

Indiana Code § 35-41-5-1 defines the offense of attempt in relevant part as follows:

> a) A person attempts to commit a crime when, acting with the culpability required for the commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime. . . .
>
> b) It is no defense that, because of a misapprehension of the circumstances, it would have

been impossible for the accused person to commit the crime attempted.

STATEMENT OF THE CASE

Pursuant to an Indiana State Police sting operation, Petitioner Richard J. Laughner was arrested and ultimately convicted of the novel offense of "attempted child solicitation." The charges were based entirely on his internet communications with an officer who posed as a 13-year-old boy.

Laughner challenges this conviction, first as a violation of due process on grounds that application of Indiana's general attempt statute to the inchoate offense of solicitation abridges a fundamental norm of American law, which has overwhelmingly rejected such "double attempt" crimes. He also challenges his conviction on grounds that the offense is incurably vague and overbroad, in violation of the First Amendment and due process.

This case arose from a series of conversations Laughner conducted over the internet with a state police officer who participated in internet chat rooms. The officer claimed to be a minor and sent Laughner a photograph of a child. In the course of these conversations, Laughner asked the officer about his sexual experiences. He eventually arranged for them to meet, and was arrested when he traveled from Indianapolis to Evansville, Indiana, for the encounter.

Prior to trial, Laughner filed a motion to dismiss the ensuing charges of child solicitation, asserting that one could not commit the crime with an adult. The trial court

granted the motion to dismiss, but simultaneously allowed the state to file an amended information, six days before trial, charging Laughner with "attempted child solicitation." A jury convicted Laughner of this offense.

On appeal, Laughner challenged his conviction on grounds that the alleged offense of "attempted child solicitation" was unconstitutional because "one cannot attempt an attempt" (App. 8-9), and on grounds of vagueness and overbreadth (App. 12-13). In its published opinion, the Indiana Court of Appeals rejected those arguments, holding as a matter of statutory interpretation that the general attempt statute applied to the child solicitation offense. (App. 8.) The court cited no authority in support of the validity of "double attempt" offenses, nor did it acknowledge the caselaw disapproving such an application of the criminal law.

The Court discerned no other constitutional infirmity with the "attempted solicitation" conviction, concluding that the charged offense of attempted child solicitation did not suffer from overbreadth because the underlying child solicitation statute "is narrowly tailored and criminalizes only specific internet communications." (App. 13.)

The Court of Appeals subsequently denied Laughner's motion for rehearing; the Indiana Supreme Court denied his petition for transfer on October 31, 2002.

REASONS FOR GRANTING THE WRIT

Indiana has recognized a crime of "attempted child solicitation using a computer network." If left standing, this anomalous precedent will broadly impact the law of inchoate crimes generally. More specifically, it will potentially expand the scope of criminal liability under some thirty states' comparable solicitation statutes.

In a context of ever-intensifying internet sting operations,[1] targeting emotionally charged offenses of child predation, over-zealous prosecution is a patent danger. *See, e.g., United States v. Poehlman,* 217 F.3d 692 (9th Cir. 2000). Given that most of the statutes criminalizing child solicitation over the internet are of very recent vintage, this decision will unquestionably have great practical impact nationwide.

Indiana is apparently the only jurisdiction whose courts have held the crime of "attempted solicitation" constitutional; some other states' child solicitation statutes create such an offense, however, as does the federal statute, 18 U.S.C. § 2422(b). Both Florida and Ohio courts have rejected the notion, on essentially the same grounds that Petitioner asserts here.

The offense of "attempted solicitation" abridges fundamental principles of American criminal law, especially in

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[1] *See* Donald S. Yamagami, *Prosecuting Cyber-Pedophiles: How Can Intent Be Shown in a Virtual World in Light of the Fantasy Defense?*, 41 Santa Clara L. Rev. 547, 550 (2001), noting that the federal government has "increased its war chest to help catch internet crimes directed against children by recently granting three million dollars to ten states and local law enforcement agencies to improve their efforts."

that it contemplates potential criminal liability for conduct that is remote from the ultimate wrongdoing the law seeks to prevent. Conduct short of any actual solicitation includes a wide range of behavior ranging from the innocuous to fantasy conversations that although troubling and inappropriate, would never eventuate in anything further. Solicitation of a child may itself constitute a "substantial step" toward child sexual abuse, *see Ward v. State,* 528 N.E.2d 52 (Ind. 1988), but a mere "substantial step" toward solicitation is amorphous in scope and could easily include constitutionally protected communications.

Petitioner therefore urges the Court to review this decision in light of its probable far-reaching impact and its difficult constitutional implications.

I. Indiana's recognition of an "attempted solicitation" offense conflicts with the decisions of other states on an important question of due process, and departs from the common law's consistent rejection of double-attempt crimes.

Petitioner Laughner here challenges a decision which is novel in American law, and which stands as a dangerous precedent nationwide. Indiana's sudden recognition of the "double attempt" crime of attempted child solicitation defies the precept of American law that has historically rejected such offenses as inconsonant with fundamental principles of criminal liability.

Understandably, the problem of the sexual solicitation of children, particularly over the internet, has come to the fore as a public concern. Child abductions have become an increasing, and horrifying, phenomenon. Parents among others are justifiably alarmed about the access the internet

might afford a predator to our children. Correspondingly, investigative and other law enforcement resources have focused on combatting this sort of crime, often employing police or volunteer investigators to pose as minors on internet sites, so as to detect adult sexual predators.[2]

As laudable as these investigations are, they must remain within constitutional boundaries and fundamental principles of American criminal law. It is hornbook law that "[t]here can be no attempt to commit a crime which is itself an attempt." 4 Charles E. Torcia, Wharton's Criminal Law § 693 at 584 (15th ed. 1996); *see also* Wayne R. LaFave, Criminal Law § 6.1(f) at 537-538 and n.42 (3d ed. 2000).

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[2] Accounts from the news media make readily apparent how extensive and intensive the surveillance and investigation of potential child predators has become. *See, e.g.,* David Rosenzweig, *Internet Sex Probe Was A Trap, Court Says; Federal Judges Free A Convicted Air Force Veteran And Criticize An E-Mail Sting Operation,* Los Angeles Times, June 30, 2000, at B1; Terri Somers, *Task Force Draws Pedophiles Out Via Chat Rooms,* Fort Lauderdale Sun-Sentinel, Aug. 12, 2001, at 1B; *Author Charged With Soliciting Minor,* Milwaukee Journal Sentinel, Nov. 9, 2002, at 10A; Jim Cook, *CyberSerpents,* Dothan Eagle, July 7, 2002, at 1, 3; Jason Song, *Indictment Accuses Former Minister of Soliciting Minor,* Baltimore Sun, June 20, 2002, at 2B; Jeanette Hurt, *Doyle Warns Would-Be Predators; Many Net Sting Arrests Have Been Made in County,* Milwaukee Journal Sentinel, June 30, 2002, at 1Z; Janan Hanna, *Internet Sex Cases Challenge Prosecutors; Who's the Victim? Defense Lawyers Ask,* Chicago Tribune, July 30, 1998, at 1; Robin Mohr, *Judges Differ On Internet Crimes Law,* Chicago Tribune, May 18, 1999 at 1; Tom Kertscher, *High Court Allows Internet Stings; Adults Seeking Sex Can Be Charged Even If 'Child' Is An Agent,* Milwaukee Journal Sentinel, June 22, 2002, at 1A; Graeme Zielinski, *Warrenton Man Charged With Child Solicitation After Internet Sting,* Washington Post, Dec. 2, 1999 at V07; Robert Worth, *Jeanine Pirro's Sting: Visiting Chat Rooms to Chase Pedophiles,* The New York Times, July 15, 2001, at 1.

This general rule against double-attempt crimes is founded both on fundamental notions of fairness, and on essential notions of criminal liability in American law. The Indiana decision abrogating this rule is constitutionally objectionable not only because of its novelty, but more basically because it contemplates criminal liability on an extremely attenuated basis, and quite possibly for conduct remote from any criminal wrong, or even innocuous in its intent and effect.

By definition, "attempted solicitation" involves conduct short of actual solicitation of a child. It therefore must necessarily include communications in which the accused did not sexually solicit a youth, but may merely have asked questions or expressed opinions regarding sexual experiences, sexual attitudes, or the like.

In cases of actual solicitation, the trier of fact can fairly infer the required specific intent from the solicitation itself. On facts that would amount only to an allegation of "attempted solicitation," however, a court or jury is forced to speculate, perhaps rather wildly, in order to conclude that a defendant intended to solicit a minor with the specific intent to engage in unlawful sexual conduct. Even in cases of *actual* solicitation over the internet, such intent may be difficult to establish. *See generally* Donald S. Yamagami, *Prosecuting Cyber-Pedophiles: How Can Intent Be Shown in a Virtual World in Light of the Fantasy Defense?*, 41 Santa Clara L. Rev. 547 (2001).

In addition to the amorphousness and probable chilling effect of such an offense, serious due process problems flow from the prospect of imposing criminal liability on grounds so attenuated in relation to actual criminal wrongdoing. Especially in a context of zealous

investigation and prosecution, this offense raises the very real possibility of prosecutions for communications that would never in fact have resulted in an actual solicitation or other criminal act, including many that were devoid of any such intent.

Needless to say, that one might ultimately be exonerated is cold comfort to a defendant wrongfully caught up in the wide nets of these internet sting operations. The trauma and lasting stigma that would accompany charges of child solicitation make constitutional safeguards to prevent such arrests all the more necessary.

The prospect of wrongful arrests and prosecutions for such crimes is no idle speculation; the sometimes excessive zeal of officers seeking to intercept possible child predators is already apparent from the burgeoning caselaw. In *United States v. Poehlman,* 217 F.3d 692 (9th Cir. 2000), for example, the Court of Appeals concluded that federal investigators in one such internet sting operation had entrapped a defendant not predisposed to commit the offense. "There is surely enough real crime in our society that it is unnecessary for our law enforcement officials to spend months luring an obviously lonely and confused individual to cross the line between fantasy and criminality," Judge Alex Kozinski wrote for the court. *Id.* at 705.

Likewise, the "attempted solicitation" offense is sure to result in charges for internet banter that, while perhaps distasteful or inappropriate, would never have gone beyond the bounds of fantasy. Indeed, it could easily reach conduct far from the realm of criminality: the mere polling of youths for their sexual attitudes by a curious parent, or a researcher, might well come to the attention of a

well-intentioned investigator and trigger charges of "attempted solicitation."

Given the overwhelming, and well reasoned, repudiation of such compounded attempt offenses by American courts (as described further below), Indiana's creation of such a crime is anomalous indeed. Indiana law had not previously sanctioned such a compounded attempt crime. Prior Indiana decisions had in fact expressly recognized that "solicitation" constitutes an attempt at the crime of child molesting. In *Ward v. State,* 528 N.E.2d 52 (Ind. 1988), the Indiana Supreme Court recognized that child solicitation is essentially a crime of attempted child molesting. The court even noted that on some facts, child solicitation may fall short of an actual attempt, because too far removed from the ultimate criminal harm of child molesting. The *Ward* court therefore clarified that child solicitation is an inchoate version of child sexual abuse which is at most a crime of attempt where, inter alia, the solicitation "takes the form of urging [and] urges the commission of the crime at some immediate time and not in the future." *Id.* at 54, *citing* Perkins, *Criminal Attempt and Related Problems,* 2 U.C.L.A. L. Rev. 319, 353 (1954).

Notably, the Indiana Legislature reacted swiftly in response to this decision affirming Laughner's conviction, amending the child solicitation statute in 2002 to endorse the crime of "attempted solicitation." Subsection (c) now provides that "In a prosecution under this section, including a prosecution for attempted solicitation, the state is not required to prove that the person solicited the child to engage in [a sexual] act at some immediate time." The legislature has thus abrogated the due process principles articulated in *Ward,* in favor of a standard removing any

concept of immediacy or proximity to any actual criminal conduct.

Clearly, both the legislative definition of child solicitation and the enforcement of such solicitation laws are pushing constitutional bounds and often exceeding them. This Court's review is necessary to reassert the primacy of due process in a realm where passions sometimes sweep past basic principles of law.

A. This decision creates a sharp division of authority between Indiana and other states.

Indiana's decision approving the offense of attempted child solicitation creates a sharp division of authority among the states. It stands at odds with both an overwhelming body of authority rejecting double-attempt crimes in general, and specific decisions rejecting the offense of "attempted solicitation."

An extensive body of caselaw nationwide rejects the notion of double-attempt crimes, at least where "complex inchoate crimes" are involved, i.e., inchoate crimes like solicitation which are not independent crimes but which entirely depend upon some other ultimate criminal goal. *See generally* Ira P. Robbins, *Double Inchoate Crimes,* 26 Harv. J. on Legis. 1 (1989); *see also* Nick Zimmerman, *Attempted Stalking: An Attempt-To-Almost-Attempt-To-Act,* 20 N. Ill. U.L. Rev. 219 (2000).

Both Ohio and Florida have rejected the notion of compounded attempt crimes, and have specifically rejected attempted solicitation crimes. The Florida Supreme Court has repeatedly invalidated attempt charges predicated on

another inchoate crime, as the Florida court noted in *Brown v. State,* 550 So. 2d 142, 143 (Fla. App. 1989):

> When a statutory offense is itself an attempt to complete an act, there is no separate crime consisting of an attempt to commit the offense. *Jordan v. State,* 438 So. 2d 825 (Fla. 1983) (no crime of attempting to resist an officer with force); *State v. Sykes,* 434 So. 2d 325 (Fla. 1983) (no crime of attempted theft); *Achin v. State,* 436 So. 2d 30 (Fla. 1982) (no crime of attempted extortion); *Adams v. Murphy,* 394 So. 2d 411 (Fla. 1981) (no crime of attempted perjury); *King v. State,* 339 So. 2d 172 (Fla. 1976) (no crime of attempt to utter a forged instrument); *Hestor v. State,* 363 So. 2d 26 (Fla. 4th DCA 1978) (no crime of attempted tampering with a witness); *Hutchinson v. State,* 315 So. 2d 546 (Fla. 2d DCA 1975) (no crime of attempted conspiracy).

The *Brown* court relied upon this solid rule to reject a crime of "attempted solicitation":

> Conceivably, a person could intend to solicit another . . . , and could take steps to approach that person in order to effect the solicitation, but be thwarted from actually soliciting. But these would constitute acts of 'mere preparation' that may not be criminalized even under the attempt provision.

550 So. 2d at 143. The court noted the reasoning in *Hutchinson,* 315 So. 2d at 549: "[t]o concede in the academic sense the possibility that there can be an attempted

[inchoate crime] is not the equivalent of declaring it to be reasonable and a punishable statutory offense." *Id.*[3]

More recently, Ohio has also rejected the compounding of attempt crimes, "attempted solicitation" in particular. In *SEO v. Austintown Township*, 722 N.E.2d 1090, 1094-1095 (Ohio App. 1998), the court held emphatically that "there can be no such offense as 'attempted solicitation' under existing Ohio law." Citing previous Ohio decisions to the same effect under the state's prostitution statute, the court reasoned that "it can hardly be argued that one who is actually soliciting another person to engage in sexual activity . . . is not in fact attempting to so engage in [illicit] sexual activity." *Id.* at 1094. The court concluded, *id.* at 1094-1095, that to compound the attempt crime would create the danger of prosecutions for innocuous conduct:

> Unlike activity specifically prohibited by the 'soliciting' statute, . . . any number of actions by individuals . . . could be subjectively construed by law enforcement officers as conduct which, if successful, could constitute or result in an offense of 'soliciting,' but which actions by themselves would not be unlawful or offensive. To permit the prosecution of such actions could conceivably subject certain citizens to arrest at the whim of a policeman for such things as standing on a street

[3] The *Brown* court observed regarding the particular case that "the evidence in this case does not support a conviction for solicitation that was intended but never took place, but does for solicitation that was committed but did not achieve its intended criminal result. . . . Because we find that the crime of 'attempted solicitation' is nonexistent, we reverse and remand this case for a new trial. Double jeopardy does not bar retrial of the appellant on the solicitation charge." *Id.* at 143-144.

corner or waving at a passing car. This is clearly beyond the scope of constitutional permissibility.

B. The question is important because, if this decision stands as precedent, prosecutions for "attempted solicitation" will undoubtedly proliferate.

Indiana's child solicitation statute is far from unique. Congress has enacted a similar provision, 18 U.S.C. § 2422(b). At least thirty states have enacted similar child solicitation statutes.[4] Almost all of these child solicitation statutes create felony offenses. Almost all contain an explicit internet component, some as an aggravating factor. Naturally, all of these jurisdictions also have criminal attempt statutes.

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[4] In addition to Indiana's statute and 18 U.S.C. § 2422(b), the states having enacted such child solicitation laws include Alabama, California, Connecticut, Delaware, Florida, Georgia, Idaho, Iowa, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming. *See* Ala. Code § 13A-6-110; Cal. Penal Code § 288.2; Conn. Gen. Stat. § 53a-90a; Del. Code Ann. tit. 11, § 1112A; Fla. Stat. Ann. § 847.0135(3); Ga. Code Ann. § 16-12-100.2(d); Idaho Code § 18-1506; Iowa Code § 709.8(3); Me. Rev. Stat. Ann tit. 17-A § 259; Mich. Comp. Laws § 750.157c, § 750.145d; Minn. Stat. § 609.352; Miss. Code Ann. § 97-5-27; Neb. Rev. Stat. Ann. § 28-805; Nev. Rev. Stat. Ann. § 207.260, § 201.195(3)(a); N.H. Rev. Stat. Ann. § 649-B:4; N.J. Stat. Ann. § 2C:13-6; N.M. Stat. Ann. § 30-9-1; N.C. Gen. Stat. § 14-202.3; N.D. Cent. Code § 12.1-20-05.1; Ohio Rev. Code Ann. § 2907.07; Ok. Stat. tit. 21, § 1123(A)(1); 18 Pa. Cons. Stat. § 6318; S.D. Codified Laws § 22-22-24.5; Tenn. Code Ann. § 39-13-528; Texas Penal Code Ann. § 39-13-528; Utah Code Ann. § 76-4-401; Vt. Stat. Ann. tit. 13 § 2828; Va. Code Ann. § 18.2-374.3; Wis. Stat. § 948.075; Wyo. Stat. Ann. § 14-3-104.

Moreover, most of these laws have been enacted or amended in the past year or two, so that their application is unlitigated and uncertain. Given the zealousness that surrounds the prosecution of child solicitation crimes, this Indiana decision is certain to impact the interpretation of these newly enacted statutes nationwide.

The internet aspect of these child solicitation offenses amplifies the dilemma created by inconsistent state law. Nothing would prevent aggressive Indiana investigators from ensnaring citizens of other states in their dragnet of "attempted child solicitation" defendants. Given the interstate communication, an unsuspecting adult in Ohio, whose courts have rejected the notion of an "attempted solicitation" crime, could find himself charged for internet communication with a minor in Indiana, based on exchanges short of solicitation, and without even having known the minor's location. Indeed, some states' child solicitation statutes expressly assert such expansive jurisdiction: *see, e.g.,* N.C. Gen. Stat. § 14-202.3(b) ("The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State."); *see also* Ala. Code § 13A-6-110; 18 Pa. Cons. Stat. § 6318. Already, this type of interstate prosecution is apparently not uncommon; *see, e.g.,* Janan Hanna, *Internet Sex Cases Challenge Prosecutors,* Chicago Tribune, July 30, 1998 (reporting the Illinois prosecution of a Tennessee man).

This expansive offense thus creates a trap for the unwary, and as argued below, would deter much protected speech to the extent people are aware of the potential for criminal liability on the basis of communications that could be construed as "attempted solicitation."

II. Conviction for "attempted child solicitation using a computer network" conflicts with this Court's important vagueness and overbreadth decisions.

The offense of "attempted child solicitation" by definition contemplates conduct that falls short of actual solicitation of a child. This offense is therefore constitutionally troubling both for its vagueness, and for its overbreadth and attendant chilling effect on communications protected by the First Amendment.

In addition to the double-attempt problems inherent in "attempted solicitation," particular features of Indiana's statute compound the law's vagueness and overbreadth. In Petitioner's vagueness challenge below, he noted that at the time of his alleged offense, the Indiana criminal code failed to define the term "solicit." Perhaps in response to this litigation, the Indiana Legislature amended the statute to define the term, but so broadly as to exacerbate rather than cure the statute's vagueness and overbreadth:

> (a) As used in this section, 'solicit' means to command, authorize, urge, incite, request, or advise an individual: . . . (4) by using a computer network . . . to perform an act [of sexual intercourse, deviate sexual conduct, or fondling].

As noted above, the legislature at the same time expressly ratified the offense of "attempted solicitation," and nullified the *Ward* court's requirement of immediacy, in the course of providing that in "a prosecution for attempted solicitation, the state is not required to prove that the person solicited the child to engage in an act . . . at some immediate time." § 35-42-4-6(c).

Also importantly, Indiana's child solicitation statute does not require that the child be solicited to engage in sexual conduct *with the defendant*. The statute clearly provides that the crime is committed if one solicits a minor to engage in sexual acts *with anyone*.

Thus, the Indiana courts and legislature have created a crime which may consist of *attempting* to "authorize" or "urge" or "advise" a minor to engage in sexual conduct *with anyone*, at some future or indefinite time.

It is entirely unclear how far an offense so defined would extend, even if it were limited to actual solicitation. But certainly, the resulting crime of "attempted child solicitation using a computer network" is unconstitutionally vague and overbroad under this Court's decisions.

A. The offense of "attempted solicitation" is inherently vague and authorizes the "standardless sweep" this Court has repeatedly found to violate due process.

For reasons closely akin to the due process problems that characterize double-attempt offenses as such, the crime of "attempted child solicitation using a computer network" is incurably vague.[5] Indiana's decision to uphold this offense therefore contravenes this Court's numerous decisions striking such laws for vagueness, because devoid of fair notice and lacking concrete standards to govern law enforcement.

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[5] Even if a narrowing construction were potentially available to salvage "attempted solicitation" from facial invalidity, the Indiana Supreme Court has declined to supply any such limiting construction.

In *City of Chicago v. Morales,* 527 U.S. 41 (1999), this Court again reaffirmed that laws lacking such definite standards run afoul of due process. In *Morales,* six members of this Court concluded that Chicago's gang congregation ordinance violated due process, in part because it would encompass a great deal of innocent conduct, 527 U.S. at 57, 60,[6] and most fundamentally because it was vague in its prohibition against certain persons' loitering, defined as "remain[ing] in any one place with no apparent purpose."

Justice Stevens noted that the challenged ordinance implicated both aspects of the vagueness doctrine: "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize *and even encourage* arbitrary and discriminatory enforcement." 527 U.S. at 56 (emphasis added).

As this Court had stressed in *Kolender v. Lawson,* 461 U.S. 352, 358 (1983), *quoting Smith v. Goguen*, 415 U.S. 566, 575 (1974):

> the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.' . . . Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep

[6] *See also* 527 U.S. at 69 (Kennedy, J., concurring in part and concurring in the judgment): "the Chicago ordinance would reach a broad range of innocent conduct."

> [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'

The Court also emphasized in *Kolender* that vagueness concerns are heightened where a law entails "the 'potential for arbitrarily suppressing First Amendment liberties.'" *Id., quoting Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965).

The *Morales* Court held that the Chicago ordinance failed to provide fair notice that would "enable the ordinary citizen to conform his or her conduct to the law." 527 U.S. at 58. As a matter of due process, "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *Id.* at 60, *quoting United States v. Reese,* 92 U.S. 214, 221 (1876).

The ordinance also vested far too much discretion in the police to decide whether a given group of people had an "apparent purpose." 527 U.S. at 60-63; *see also id.* at 71 (Breyer, J., concurring in part and concurring in the judgment). In her concurring opinion, Justice O'Connor particularly stressed the law's lack of sufficient guidelines to prevent "arbitrary and discriminatory enforcement" and its potential to allow the police "to conduct 'a standardless sweep . . . to pursue their personal predilections.'" *Id.* at 65.

Here, as explained above, Indiana has created an offense which may consist of nothing more than *attempting* to advise a minor to engage in sexual intercourse, with someone else, at some future time. As the Ohio court observed regarding "attempted solicitation," 722 N.E.2d at 1094-1095, this expansive and amorphous offense could

easily be "subjectively construed by law enforcement officers" to include innocent conduct, and thus may subject citizens to arrest "at the whim of a policeman."

Bootstrapping the notion of attempt onto the already questionable offense defined by Indiana law will undoubtedly trigger arrests at the whim of well-meaning investigators who expect to find a child predator under every internet bed. One can easily imagine prosecutions for a variety of innocent, and constitutionally protected, discussions of sex in internet fora. As discussed more fully below with regard to overbreadth, a wide variety of postings to internet discussion groups and uninhibited sexual banter in chat rooms could be deemed to constitute a "substantial step" toward the crime of "advising" a minor to have sex with someone, at some indefinite future time. Indeed, it is not at all clear that merely logging on to a chat room where young teens are engaged in sexual discussions might not suffice as such a substantial step.

As in *Morales,* this law is classically vague. It fails to provide fair notice as to what conduct might constitute "attempted child solicitation" in internet fora, leaving citizens to speculate at the peril of felony charges of the most stigmatizing nature. Even more certainly, this law and similar provisions will "authorize and even encourage" arbitrary enforcement, subjecting internet participants to potential arrest in the course of a standardless sweep designed to nab all possible child predators.

As in *Morales*, this offense would reach a great deal of innocent conduct. Heightening these concerns, it is far worse than many such laws stricken for vagueness, in its potential for arbitrarily suppressing First Amendment

liberties. For all these reasons, this Court's review is urgently required.

B. Application of the attempt offense to internet solicitation creates a substantially overbroad offense that would reach a great deal of innocuous and constitutionally protected conduct.

The offense of "attempted child solicitation using a computer network" is also substantially overbroad in violation of the First Amendment. Because this offense criminalizes conduct that by definition falls short of actual solicitation, it targets conduct including mere communications of a sexual nature. Clearly, it would include sexual conversations between an adult and a minor (or purported minor), short of a solicitation, that might never progress beyond conversation and fantasy. More importantly, however, it would also include innocuous communications that never entailed any intent to solicit a child.

As this Court has defined it, "the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *Morales,* 527 U.S. at 52, *quoting Broadrick v. Oklahoma,* 413 U.S. 601, 612-615 (1973).

Under this and related First Amendment principles, the Court has held unconstitutional a number of laws that, although well motivated attempts to protect minors, have gone too far in banning or burdening protected speech. *See Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002) (Child Pornography Prevention Act ban on virtual child

pornography was facially overbroad); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (requirement that cable operators either scramble sexually explicit channels in full or limit the hours of such programming was a content-based violation of the First Amendment); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (provisions of the Communications Decency Act seeking to protect minors from harmful internet material were content based and facially overbroad); *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989) (Communications Act provisions denying adults access to indecent but not obscene telephone messages violated First Amendment because not narrowly drawn to protect minors). As in these cases, the criminalization of "attempted child solicitation using a computer network" is well intentioned but fatally overbroad.

The potential impermissible applications of Indiana's child solicitation statute are legion. For example, given the expansive language defining this crime, "attempted solicitation" charges could result from the following internet communications:

> * A concerned parent joins internet chat room banter in an effort to learn more about the current state of teen sexual mores. She or he may ask the participants – who are already discussing such matters – whether they are virgins, at what age most of their peers become sexually active, the ages of their sexual partners, etc.
>
> * A sociologist or other researcher seeking informal, candid responses from youths might enter a chat room or listserv discussion and make similar inquiries, perhaps repeatedly in an effort to generate a large sample of responses.

* A sexual therapist or other advocate of sexual liberation "advises" minors on a discussion list or chat room site against rigid vows of chastity of the sort promoted by some religious sects, and perhaps even "urges" them to have sexual relations when they feel they are mature enough.

Any of these communications could easily draw the attention of an investigator keenly watching to detect "attempted solicitation." They are all, however, communications within the scope of First Amendment protection, particularly assuming that the speaker has no intent to solicit a minor.

Of course, the more troubling of these communications short of actual solicitation are sexual fantasy conversations between an adult and a minor. However, where these internet conversations fall short of an actual solicitation, criminalizing them is inappropriate for several reasons. First, one must remember that the vast majority of prosecutions of this nature result from the defendant's contact with a law enforcement officer posing as a minor. Many other instances involve adults pretending to be children for purposes of internet fantasy. Given these vagaries of internet communication, intent to solicit a child is virtually impossible to establish from anonymous sexual banter on the internet; it is hard enough to prove even in cases of actual solicitation followed by an attempted meeting with the correspondent. *See* Yamagami, *supra*.

Not only are such conversations remote from the criminal harm contemplated by the child solicitation statute; they may actually be harmless outlets for some sexually maladjusted adults. As Judge Posner has written of pornography:

> There is fairly good evidence . . . that pornography is a substitute for (rather than a complement to) exhibitionism, voyeurism, and sexual offenses against minors generally, offenses typically committed by timid persons who do not want direct physical contact with other adults and may consider a picture [or an internet conversation] a close substitute for a living sex object.

Richard A. Posner, Sex and Reason 213 (1992), *citing* Berl Kutschinsky, *Studies on Pornography and Sex Crimes in Denmark,* 99-159 (1970).

For these reasons, prosecutions for "attempted solicitation" are likely to ensnare "obviously lonely and confused individuals" who had no intention "to cross the line between fantasy and criminality," as in *Poehlman*. More centrally, however, they are likely to ensnare innocent and unquestionably protected communications.

C. The threat of a felony conviction for "attempted internet solicitation" would unconstitutionally chill communication protected by the First Amendment.

Finally, the questions presented by this case are compelling because of the inevitable chilling effect of an "attempted solicitation" offense on protected internet communication. Given the vagueness and overbreadth problems discussed above, several factors exacerbate the censorial effect of this offense.

The severity of the penalties and the vagaries of internet communication combine to create an intolerable risk that one's postings on sexual matters might be construed as

"attempted solicitation." As noted above, these solicitation offenses are felonies in most jurisdictions.

The nature of the forum further complicates the situation and increases the possible chilling effect: many discussions of sexuality may take place on discussion lists including participants of various and indeterminate ages. In *Reno v. American Civil Liberties Union,* this Court noted several realities of internet communication that make any such vague and sweeping regulation constitutionally problematic.

For one, the internet has become an extremely important forum in the lives of Americans, and "the content on the Internet is as diverse as human thought." 521 U.S. at 852. As is well known, the internet features a great deal of sexually oriented material, ranging "from the modestly titillating to the hardest-core." *Id.* at 853.

Internet exchanges take several forms including e-mail, listserv discussion groups, and chat rooms. *Id.* at 851. In most of these settings, participants have "no effective way to determine the identity or the age of a user who is accessing material," so that "no current technology could give a speaker assurance that only adults were listed" in a particular internet forum. *Id.* at 855 and n.20.

This anonymity gives rise to a wide range of fantasy and role-playing on the internet, which has been described as "a masquerade ball – a fantasy world where people go to play out their sexual fantasy roles under the cloak of anonymity." Yamagami, *supra,* at 561. It also provides fora for more serious discussions concerning sexuality, and an important source of information about sex.

These realities combine to make the criminalization of communications falling short of actual child solicitation inveterately vague and overbroad, and chilling of free expression. To the extent that citizens are even aware that communications short of solicitation could subject them to felony charges for "attempted solicitation," they are likely to steer far clear of the danger, by eschewing any such sexual "advice" or advocacy to an audience that might include young teens. (More commonly, this offense will function as a trap for the unwary whose communications draw the watchful attention of internet investigators.)

Again, compounding the chilling effect problem is the reality that Indiana is effectively legislating for the entire country. Regardless of other states' ultimate judicial and legislative decisions in this area, communications addressed to internet users in Indiana, perhaps with no way of knowing the location of the recipient, could result in felony charges if one crosses a perceived line and "urges" or "advises" a youth to have sexual relations with anyone, even at some indeterminate future time.

The constitutional perils of this well intentioned but misconceived criminal offense are therefore national in scope, and this decision will inevitably cast a broad shadow. This Court's review is essential to close a Pandora's box of double-attempt liability for a "crime" which may consist of nothing more than speech protected by the First Amendment.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari and reverse the decision below.

Respectfully submitted,

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APPENDIX A

Laughner v. State of Indiana,
769 N.E.2d 1147 (Ind. App. 2002)

FOR PUBLICATION

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IN THE
COURT OF APPEALS OF INDIANA

RICHARD J. LAUGHNER,)
Appellant-Defendant,)
vs.) No. 82A01-0104-CR-141
STATE OF INDIANA,)
Appellee-Plaintiff,)

APPEAL FROM THE
VANDERBURGH SUPERIOR COURT
The Honorable Robert Pigman, Judge
Cause No. 82D02-0008-CF-710

June 12, 2002

OPINION – FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Richard Laughner appeals his conviction, after a trial by jury, of one count of attempted child solicitation, a class C felony. He also appeals his sentence thereon.

We affirm in part, reverse in part, and remand for resentencing.

ISSUES

1. Whether attempted child solicitation is a crime.

2. Whether attempted child solicitation can be established when the subject of the solicitation is not a child.

3. Whether a conviction for attempted child solicitation is unconstitutional on various grounds.

4. Whether the trial court erroneously denied Laughner's motion for change of venue.

5. Whether the trial court erred in allowing the State to file its amended information six days before trial and denying Laughner's motion for a continuance.

6. Whether Laughner's due process rights were violated by the State's destruction or failure to preserve the instant message communications from Laughner to Metzger during the period between July 13 and August 8, 2000.

7. Whether the trial court erroneously admitted the documents in which Metzger saved his instant message communications with Laughner.

9. Whether the trial court erred in denying two of Laughner's tendered instructions.

10. Whether the trial court erred in sentencing Laughner.

FACTS

In the year 2000, Indiana State Police detective Joel Metzger, based in Evansville, was working as part of the Crimes Against Children Unit. Metzger "entered" computer chat rooms on the internet and portrayed himself as a child, thus available to be solicited for sex by adults. On the afternoon of July 13, 2000, Metzger was using the screen name "LLuke12" in a chat room of America On Line (AOL) called "Indy M4M," Indy men for men. As "LLuke12," Metzger received an instant message from "Tret6128," who was later identified as Laughner, age forty. In the course of this instant message conversation, Laughner asked Metzger's age, and Metzger said he was thirteen years-old; Laughner asked if Metzger wanted to "meet up" and asked to "chat about this on the phone." (Tr. Ex. 1). When Metzger said that was not possible because his mother was home and "she watches me on the phone," Laughner said he would try to find Metzger in the chat room during the evening. *Id.* Using the AOL instant message program, Metzger activated the "select all" feature to capture the conversation-via-messages with Laughner, and then the "copy" feature; finally, he transferred the copy of the conversation to a document he saved in his word-processing program. (Tr. p. 517).

On that evening, Laughner found Metzger in the chat room and asked a series of questions about his sexual experiences; he again indicated his desire to talk to Metzger on the telephone. After Metzger gave Laughner

his telephone number, Laughner called back immediately. As before, Metzger saved the instant message conversation; he also tape recorded the telephone conversation.[1]

During the next few weeks, Laughner attempted to talk with Metzger three or four times by sending brief instant messages saying "hi or hello." (Tr. p. 528). Metzger did not respond because based upon the July 13th telephone conversation, he thought that Laughner was simply interested in "a phone sex relationship." *Id.*

On August 8, 2000, Laughner sent Metzger an instant message saying, "u wanna meet up" and again asked how old Metzger was. (Tr. Ex. 4). Metzger answered, "13." *Id.* Laughner asked where Metzger was located and Metzger told him Evansville. Laughner said that he was in Indianapolis and asked for a picture of Metzger. Laughner sent Metzger a picture of himself, and Metzger sent Laughner a picture of a child. Laughner once more asked whether Metzger wanted to "meet up," and then asked some ten or eleven questions about Metzger's sexual experiences.[2] *Id.* Again, Metzger saved the instant message conversation.

On the morning of August 11, 2000, Laughner contacted Metzger and asked, "u wanna get off?" (Tr. Ex. 5). Metzger said, "when?" and Laughner replied, "today." *Id.* Metzger asked if Laughner was "serious" about "com[ ]ing

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[1] The audiotape of this telephone conversation was played for the jury during the trial, and a portion was replayed by the prosecutor during his closing argument. However, Laughner's record on appeal does not contain the tape.

[2] The last question Laughner asked was, "u wanna get fucked [?]" (Tr. Ex. 4).

down here," and Laughner answered, "i am very serious," and added "today?" *Id.* Laughner said, "i will come down," that he could be there "around 2," and they arranged to meet at the Bigfoot gas station. *Id.* Laughner stated twice again that he would be there at 2:00 p.m. The instant message conversation ended at 10:05 a.m., and Metzger saved it as he had the other conversations.

Laughner arrived at the Bigfoot station at 1:57 p.m. When confronted by Metzger, Laughner admitted that he was "Tret6128." Subsequently, Metzger advised Laughner of his *Miranda* rights; Laughner signed a statement indicating he understood his rights, waived them, and was willing to answer questions and make a statement without a lawyer. During that interview, which was taped and played for the jury,[3] Laughner admitted to having sent the various instant messages to "LLuke12" and having telephoned "LLuke12" on July 13th. According to Laughner, he drove to Evansville on August 11th "to see" whether "LLuke12" was a child; when asked whether he was hoping that was the case, his answer was, "yes in a way"; as to whether he would have acted upon the "opportunity" to have "consensual" sex with a thirteen year-old child, he answered, "It would have been tough." (Appellant's App. p. 286).

The State initially charged Laughner with attempted child solicitation, a class C felony, on August 17, 2000, in Vanderburgh County. On August 30, 2000, the State filed

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[3] As with the audiotape of the telephone conversation between Laughner and Metzger, the tape was not included in Laughner's record on appeal.

an amended information charging Laughner with child solicitation, a class C felony. On January 21, 2001, Laughner filed a motion to dismiss, arguing that one could not commit the crime of child solicitation "with an adult." (Tr. p. 5). The trial court denied the motion to dismiss. On March 15, 2001, the trial court *sua sponte* reconsidered its previous ruling, stating that according to its file the charge against Laughner was child solicitation, and as to that charge he was granting the motion to dismiss. The trial court then permitted the State to file an amended information that charged Laughner with attempted child solicitation. Laughner asked for a continuance of the trial set to commence on March 21, 2001. The State objected, arguing that to reschedule its AOL witness would delay the trial for months.[4] The trial court denied Laughner's continuance motion. On March 20, 2001, Laughner filed another motion to dismiss, a motion in limine to exclude the instant message conversations, and a motion for change of venue, all of which were denied.

At trial, the court admitted into evidence, over Laughner's objection, the documents in which Metzger had saved the instant message conversations between himself and Laughner. An expert witness from AOL testified as to how a computer can access an AOL chat room, how an instant message conversation is conducted, and how the text of such a conversation can be recorded; the witness also demonstrated what the various computer screens for chat rooms and instant messaging look like, and explained certain AOL records of Laughner's account. Laughner

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[4] Laughner had deposed this witness five weeks earlier, on February 6, 2001.

tendered eleven proposed instructions, several of which were given by the trial court. However, Laughner's proposed instructions regarding the jury deliberation process and the legality of sexual conversations between consenting adults were refused.

The jury convicted Laughner as charged. Subsequently, the trial court imposed the presumptive four-year sentence, to be executed.

DECISION

1. The Crime

Laughner first argues that because there is no "clear statutory language" so providing, there can be no crime of attempted child solicitation in Indiana. Br. of Appellant at 15. We disagree.

We necessarily begin from the premise that all crimes are statutory, and an act constitutes a crime when our legislature has defined it as such. *See Herron v. State*, 729 N.E.2d 1008, 1011 (Ind. Ct. App. 2000), *trans. denied.* Accordingly, we turn to that which our legislature has enacted as the definition of the specific offense of *child solicitation* as follows:

> A person eighteen (18) years of age or older who knowing or intentionally solicits a child under fourteen (14) years of age to engage in
>
> (1) sexual intercourse;
>
> (2) deviate sexual conduct; or
>
> (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person;

> commits child solicitation, a class D felony. However, the offense is a Class C felony if it is committed by using a computer network.

Ind. Code § 35-42-4-6. The offense of *attempt* is defined in pertinent part as follows:

> A person attempts to commit a crime when, acting with the culpability required for the commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime.

Ind. Code § 35-41-5-1.

When we construe a statute, the primary rule is "to ascertain and give effect to the intent of the legislature." *Chambliss v. State,* 746 N.E.2d 73, 77 (Ind. 2001). "The best evidence of legislative intent is the language of the statute itself, and all words must be given their plain and ordinary meaning unless otherwise indicated by statute." *Id.*

The child solicitation statute is a specific one, whereas the attempt statute is one of general applicability. No statutory language forbids there being an attempt offense in the case of the crime of solicitation.[5]

Laughner directs us to *Ward v. State,* 528 N.E.2d 52 (Ind. 1988), to support his contention that "one cannot

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[5] Similarly, in Michigan, the court found its general attempt statute "carve[d] out no exception for those who, possessing the requisite criminal intent to commit an offense prohibited by law and taking action toward the commission of that offense, have acted under an extrinsic misconception." *People v. Thousand,* 465 Mich. 149 at ___, 631 N.W.2d 694, 701 (2001).

attempt an attempt." Br. of Appellant at 17. *Ward* began from the premise that to constitute "criminal attempt," the defendant "must have been acting with specific intent to commit the substantive crime, and he must have engaged in an overt act which constitutes a substantial step toward commission of the crime." *Id.* at 54 (citing *Zickefoose v. State,* 270 Ind. 618, 388 N.E.2d 507 (1979)). *Zickefoose* declared, "When the defendant has done all that he believes necessary to cause a particular result, regardless of what is actually possible under existing circumstances, he has committed an attempt." 270 Ind. at 263, 388 N.E.2d at 510.

Specifically, *Ward* involved two charges of attempted child molesting, wherein the alleged substantial step was only some verbal solicitation by the defendant. Our supreme court analyzed this verbal solicitation in two steps to determine whether it "rose to the level of an attempt" to commit the crime of child molesting. *Ward,* 528 N.E.2d at 54. In the first step, it declared that such verbal solicitation

> may be a substantial step only when: 1) the solicitation takes the form of urging; 2) the solicitation urges the commission of the crime at some immediate time and not in the future; and 3) the cooperation or submission of the person being solicited is an essential feature of the substantive crime.

Id. The next step was for the court to "consider the specific crime, and the wrongful human conduct that the legislature sought to sanction." *Id.*

Hence, *Ward* holds that a verbal solicitation can be a substantial step, given certain facts. As to the second step,

the court expressly noted that "child molesting is a sufficiently serious crime to justify drawing a fairly early line to identify and sanction behavior as an attempt." *Id.* *Ward* also recognized that unlike other types of two-party solicitation, "child solicitation seems to be the only such crime that involves just one potentially guilty party." *Id.* Such reasoning led to the conclusion that solicitation could rise to the level of an attempt in child molesting. However, as the State emphasized at oral argument,[6] *Ward* did not involve the offense of solicitation and, thus, does not definitively speak to that offense as argued by Laughner.

In support of his argument, Laughner discusses in his brief the academic analysis of solicitation and general attempt offenses and the law of other states as well as federal law. Nevertheless, our task is to first look to the statutes of Indiana, along with evidence of legislative intent therein, and existing Indiana precedent. The foregoing provisions of Indiana statutory and common law suffice to support the existence of the crime of attempted child solicitation in the case of one who engages in an overt act that constitutes a substantial step toward soliciting someone believed to be a child under fourteen to engage in sexual activity, even if it turns out the solicited person is an adult.

2. When the Person Solicited Is Not a Child

Laughner next contends that a material element of the crime of attempted child solicitation over the internet

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[6] We heard oral argument on this case on April 1, 2002. We commend the presentations by both parties.

is the existence of "an actual child under the age of fourteen," and therefore, "one cannot be convicted of the attempted solicitation of an adult police officer posing as a child because of the failure to establish a material element of the offense." Br. of Appellant at 19. Laughner argues that it was a "legal impossibility" to commit attempted child solicitation in this case because Metzger, to whom he directed the soliciting communication, was not a child under the age of fourteen.

To support his assertion about the "material element," Laughner directs us to the definition of the child solicitation offense. However, as the State correctly notes, Laughner "was not convicted of child solicitation; he was convicted of attempted child solicitation, and the age of the intended victim is not an essential element" of the offense of attempted child solicitation. Br. of Appellee at 14. Thus, the initial premise of Laughner's argument must fail.

The attempt statute expressly provides, "It is no defense that, because of a misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempted." I.C. § 35-41-5-1(b). In *Zickefoose,* our supreme court found it "clear" that this language "reject[ed] the defense of impossibility." 170 Ind. at 623, 388 N.E.2d at 510. The court continued,

> It is not necessary that there be a present ability to complete the crime, nor is it necessary that the crime be factually possible. When the defendant has done all that he believes necessary to cause the particular result, regardless of what is actually possible under existing circumstances, he has committed an attempt. The liability of the defendant turns on his purpose as manifested through his conduct. If the defendant's conduct,

> in light of all the relevant facts involved, constitutes a substantial step toward the commission of the crime and is done with the necessary specific intent, then the defendant has committed an attempt.

Id.

Here, the State alleged that Laughner's conduct established that he had done all that he believed necessary to have solicited a child under fourteen, and that the evidence showed that conduct to include a substantial step toward solicitation of a child under fourteen. The fact that it was not "actually possible," *Zickefoose,* 270 Ind. at 623, 388 N.E.2d at 510, because Metzger was not a child, does not bar his conviction for an attempted child solicitation. *See id.*

3. Constitutional Claims

Laughner contends that "criminalizing the attempted solicitation of an adult pretending to be a child on the internet violates the Fifth and Fourteenth Amendments and Article One, Sections One and Twelve, of the Indiana Constitution." Br. of Appellant at 23. He argues that his prosecution violates Due Process and Indiana's Due Course of Law provision by criminalizing his "belie[f] that LLuke12 was a child." *Id.* at 24, 26. As no more than argumentative assertions, these claims are insupportable. Laughner was prosecuted not for believing LLuke12 was under fourteen but for having intentionally solicited a person whom he believed to be a child under the age of fourteen to engage in sexual activity.

Next, Laughner argues that the internet child solicitation statute violates the federal and state constitutional

protections of speech by seeking to "criminalize[ ] communications over the internet." *Id.* at 29. Laughner contends the "First Amendment violation is especially egregious as applied" because he was convicted for typing the "innocuous question" of "u wanna get off." Reply Br. at 12. However, our review of the statute indicates that it is narrowly drafted and criminalizes only specific internet communications – those that solicit a child under age fourteen to engage in certain sexual activities intended to arouse or satisfy the sexual desire of either the child or the solicitor. Thus, the statute does not suffer from the overbreadth found in the Communications Decency Act in *Reno v. ACLU,* 521 U.S. 844 (1997). As to Laughner's claim that his single question did not meet the "solicitation . . . test of *Ward v. State,* 528 N.E.2d 52, 54 (Ind. 1988)," Reply Br. at 12, we find that the context of Laughner's communications on August 11 does satisfy *Ward.* He asked, "u wanna get off?", specified "today," stated he was "very serious" about traveling to Evansville, three times indicated he would be there at 2:00, and arranged a specific meeting place. (Tr. Ex. 5). As applied, Indiana's statute does not violate freedom of speech.

Laughner next argues that the statute violates the Proportionality Clause of the Indiana Constitution because it punishes the attempted solicitation of a child on the internet, a class C felony, more severely than the face-to-face solicitation of an actual child, a class D felony. He directs us to the case of *Conner v. State,* 626 N.E.2d 803 (Ind. 1993), in which our supreme court considered the statutory anomaly whereby dealing nearly ten pounds of real marijuana exposed one to less criminal liability than distributing one gram of fake marijuana. The Proportionality Clause, Article 1, Section 16, directs that "[a]ll

penalties shall be proportioned to the nature of the offense." *Conner* is not directly apposite, because in *Conner,* the overly severe penalty was for selling what was represented to be an illegal substance but was not, as compared to the penalty for selling the actual illegal substance. Here, the comparison is between soliciting a child over the internet and soliciting a child in person. Thus, the question is whether the penalty is "graduated and proportioned to the nature of" the offense. 626 N.E.2d at 806.

Although on its face the differing penalty for the two crimes noted by Laughner is somewhat troubling, we are not free "to set aside the legislative determination as to the appropriate penalty merely because it seems too severe." *State v. Moss-Dwyer,* 686 N.E.2d 109, 112 (Ind. 1997). The legislature may have deemed that use of the internet may expose Indiana children to dangers that require a greater vigilance by society, or that use of the internet lessens inhibitions. Such considerations could lead it to enact the internet statute with a more severe penalty, in order to stand as a stronger deterrent. Hence, the statutory scheme may reflect a legislative determination that the internet crime was indeed a more serious crime. *See id.* at 113. Such reasoning leaves us unable to justify striking down the legislative determination as to the appropriate penalty for the internet solicitation of a child.

4. Venue

Laughner asserts that venue for the offense was not proper in Vanderburgh County "when the sole basis of the charge was that [he] committed the offense simply by typing the message 'u wanna get off?' into his computer in

Marion County." Br. of Appellant at 38. According to Laughner, any offense was "committed" by him when he sent his message; because he sent the message in Marion County, he must be tried in Marion County, "the county in which the offense shall have been committed," under Article 1, Section 13 of the Indiana Constitution.

In *Wurster v. State,* 715 N.E.2d 341, 350 (Ind. 1999), our supreme court noted that sending a tax return from one county to a second county for processing was

> analogous to firing a gun across a county line. The offense is committed in both the county where the shooting starts and the county where the victim is hit.

For the purpose of venue, it found the critical fact in such a scenario to be whether the defendant took any "action directed at" the second county. *Id.* Here, Laughner admittedly sent the communication of August 11 to LLuke12 in Evansville, which is in Vanderburgh County. Further showing "action directed at" Vanderburgh County are the facts that he (1) arranged a meeting in Evansville in furtherance of the attempt that was the subject of the conversation, and (2) did immediately travel to that county. Because the charge involved action taken by him directed at Vanderburgh County, that county had venue to try him.

5. Information Amendment

Next, Laughner argues that the trial court "abused its discretion in allowing the State to file a substantively amended information, which changed its theory of the case, six days before the scheduled trial and then denying [his] motion for a continuance." Br. of Appellant at 45. As

noted in FACTS, Laughner was originally charged on August 17, 2000, with attempted child solicitation for having attempted

> to commit the crime of child solicitation by intentionally soliciting Joel Metzger, an undercover officer who was impersonating a child under fourteen (14) years of age, to engage in sexual intercourse by communicating such solicitation using a computer network, which conduct constituted a substantial step toward the commission of said crime of child solicitation. . . .

(Appellant's App. p. 12). Shortly thereafter, on August 30, 2000, the charge was amended to child solicitation, for having

> knowingly solicit[ed] Joel Metzger, an undercover officer who was impersonating a child under fourteen (14) years of age, to engage in deviate sexual conduct or any fondling or touching intended to arouse or satisfy the sexual desires of either the alleged child or the said Richard J. Laughner, by communicating such solicitation using a computer network. . . .

(Appellant's App. p. 20). Laughner moved to dismiss the child solicitation charge, and the trial court initially denied his motion based upon its mistaken belief that the charge remained attempted child solicitation. Six days before trial, when the trial court realized that the pending charge was child solicitation, it granted Laughner's motion to dismiss. At the same time, the trial court allowed the State to amend the information to the charge of attempted child solicitation, to wit: that Laughner

> did attempt to commit the crime of Child Solicitation by knowingly soliciting Joel Metzger, an

> undercover officer who was impersonating a child under fourteen (14) years of age, to engage in deviate sexual conduct or any fondling or touching, the said Richard Laughner using a computer network, and through the use of the computer, discussing sex with Joel Metzger that they engage in sexual activity to arouse or satisfy the sexual desire of either the alleged child or the said Richard J. Laughner, which conduct constituted a substantial step toward the commission of said crime of Child Solicitation.

(Appellant's App. p. 187). Laughner moved for a continuance, which was denied.

Laughner contends the March 15th amendment was one of substance, in which case the law requires the amendment to take place thirty days before the February 2nd omnibus date. *See* Ind. Code § 35-34-1-5(b). However, "[a]s a general rule any information may be amended at any time before, during, or after trial as long as the amendment does not prejudice the substantial rights of the defendant." *Hegg v. State,* 514 N.E.2d 1061, 1063 (Ind. 1987). Those rights are deemed not to have been prejudiced when the defendant has notice of the amended charge, an opportunity to be heard regarding the charge, and adequate time to prepare a defense. *Id.* Here, Laughner had notice of the amendment, and his argument against the amendment was heard by the trial court. The amendment was filed on a Thursday, and trial was set to begin the next Wednesday. In his brief, as at oral argument, Laughner argues that the amended charge required him to marshal different facts, evidence, and authority, but he provides no specific examples thereof. We do not find that the trial court committed reversible error in allowing the State to amend the information six days

before trial of a charge that had been pending for over six (6) months.

Laughner also claims that the trial court erred when it denied his request for a continuance, arguing that it is required when "'requested, to allow the defendant adequate time to prepare for trial.'" Br. of Appellant at 55 (quoting *Tripp v. State,* 729 N.E.2d 1061, 1064 (Ind. Ct. App. 2000)). We note that *Tripp* did not concern the denial of a motion for a continuance. Moreover, as in the previous discussion, Laughner fails to indicate what he was unable to do to prepare for trial in the six days allowed. The trial court's decision on a defendant's continuance motion is reviewed for an abuse of discretion. *Henderson v. State,* 173 Ind. App. 505, 508, 364 N.E.2d 175, 177 (1977). We find no such abuse here.

6. Instant Message Preservation

Laughner claims the trial court violated his due process rights by not having preserved the instant message communications from him to Metzger between July 13 and August 8, 2000, communications which he characterizes as "exculpatory evidence." Br. of Appellant at 57. He concedes that "there is no way to know what transpired in the unpreserved chats" but then "contends that several lengthy conversations took place, which further bolstered his opinion that LLuke12 was not a child." *Id.* at 59. However, no evidence in the record supports this latter contention.

Materially exculpatory evidence "is that evidence which 'possesses an exculpatory value that was apparent before the evidence was destroyed' and must 'be of such a nature that the defendant would be unable to obtain

comparable evidence by other reasonably available means.'" *Chissell v. State,* 705 N.E.2d 501, 504 (Ind. Ct. App. 1999) (quoting *California v. Trombetta,* 467 U.S. 479, 489 (1984)). The only evidence about messages between July 13th and August 8th is Metzger's testimony that Laughner sent him very brief instant messages several times but that he had neither answered nor saved those messages because he believed Laughner was only interested in phone sex. As we said in *Chissell,* a defendant "is not required to prove conclusively that the destroyed evidence was exculpatory," but "there must be some indication that the evidence was exculpatory." 705 N.E.2d at 504. Finding none here, we find no violation of Laughner's due process rights in this regard.

7. Admission of Instant Message Conversation Documents

Next, Laughner argues that the trial court "abused its discretion in admitting the alleged instant message chats between [him] and the state trooper posing as a child because the text of the alleged chats was not an 'original' preserved by the AOL logging feature but rather a cut-and-pasted copy into a word-processing program, which allowed for editing and tampering." Br. of Appellant at 60. He cites Indiana Evidence Rules 1002 and 1001(3), and contends the admitted documents "were not 'originals' within the meaning of those rules." *Id.* at 62.

The trial court has broad discretion to admit or exclude evidence, and its action in that regard will not be reversed on appeal "absent an abuse of that discretion." *Hardiman v. State,* 726 N.E.2d 1201, 1203 (Ind. 2000). "A trial court abuses its discretion when its evidentiary

ruling is clearly against the logic, facts and circumstances presented." *Id.*

As the State correctly notes, Laughner does not challenge the foundation for admission of the documents – established by Metzger's testimony about his knowledge of the conversations and that the printed documents accurately reflected the contents of the conversations. Rather, his argument is that the documents should not have been admitted because they were not "original," which could only be achieved by the use of an AOL "logging" feature.

Evidence Rule 1002, the "best evidence" rule, requires an "original" in order to prove "the content" of a writing or recording. However, Evidence Rule 1001(3) provides that when "data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an 'original.'" According to Metzger, he saved the conversations with Laughner after they were concluded, and the printout document accurately reflected the content of those conversations. Therefore, the printouts could be found to be the "best evidence" of the conversations between Metzger and Laughner, and their admission would not be an abuse of discretion.

9. Instructions

Jury instruction is a matter within the trial court's sound discretion, and we review its decision thereon "only for an abuse of that discretion." *Cline v. State,* 726 N.E.2d 1249, 1256 (Ind. 2000). When the trial court refuses a tendered instruction, we consider "(1) whether the instruction correctly states the law; (2) whether there was evidence in the record to support the giving of the instruction; and (3) whether the substance of the instruction is covered

by other instructions given by the court." *Id.* Laughner contends that the trial court abused its discretion in refusing two of his proposed "tendered instructions that were correct statements of the law, supported by the evidence, and not covered by other instructions." Br. of Appellant at 64.

The first of the proposed instructions that he tendered, and argues should have been given, is as follows:

> The court instructs you that as a matter of law the following conduct is legal and may not be considered by you as evidence of guilt should you believe that there has been evidence of such conduct:
>
> 1. Discussions about sex over the internet.
>
> 2. Discussions about engaging in homosexual behavior between consenting adults.
>
> 3. Homosexual behavior between consenting adults.

(Appellant's App. p. 545). The trial court instructed the jury on the statutory definition of an attempt and child solicitation. It further instructed the jury that for it to find Laughner guilty, the State must have proven beyond a reasonable doubt that Laughner

> 1. Knowingly had a conversation about sex with Joel Metzger on August 11, 2000;
>
> 2. That the defendant had that conversation with the intent to engage in either criminal deviate conduct or any touching or fondling with the intent to arouse or satisfy the sexual desires of either the defendant or Joel Metzger;

> 3. That this conversation with Metzger was done by using a computer network;
>
> 4. That this conversation constituted a substantial step towards the commission of the offense of Child Solicitation;
>
> 5. That the event occurred in Vanderburgh County;
>
> 6. And in addition, before you may find the defendant guilty the defendant must have believed from all of the facts and circumstances known to him that Joel Metzger was under the age of fourteen years of age at the time of their instant message conversation on August 11, 2000.

(Tr. pp. 739-740). First, we believe that in light of the detail already contained in the instruction given by the trial court, Laughner's tendered instruction would have been both confusing to the jury and misleading as it considered the instant charge. Further, we find that when the trial court explicitly instructed the jury as to what facts it needed to find in order to find Laughner guilty of the offense charged, *i.e.*, what the jury "should consider," the trial court's instruction implicitly covered the substance of Laughner's proposed instruction as to what "may not be considered" by the jury. *See Cline*, 726 N.E.2d at 1256 ("the substance of the instruction is covered by other instructions given by the court").

Next, Laughner argues that the trial court abused its discretion when it refused to give his second proposed instruction to the jury as follows:

> The Court will now instruct you concerning the manner of your deliberations:

When you retire to the jury room you should first select a foreman. The role of the foreman is to communicate with the court and to sign the verdict form. The foreman does not have the right to control the deliberations.

However, if any juror is dissatisfied with the manner in which deliberation [sic] are being conducted that juror should communicate his or her dissatisfaction with [sic] the court.

Any juror may request that the foreman communicate to the Court any question which any juror may have. The foreman is obligated to comply with this request.

The jury may request to review the exhibits and if it has a disagreement as to what a particular witness said may ask to listen to that witnesses [sic] entire testimony.

Each juror must be given the opportunity to fully state his or her views of the evidence.

You should feel under no pressure to reach a verdict.

If a juror or jurors need to rest, to take a break from deliberations, need to obtain nourishment, need to smoke a cigarette, or need to adjourn deliberation in order to sleep that need should be communicated to the court which will comply with any reasonable request. In the event that you wish to sleep you will be transported to a local hotel where you will be provided appropriate accommodations at county expense.

(Appellant's App. p. 546). Laughner cited and lifted language from a series of cases for the proposition that his proposed tendered instruction correctly states the law. Our

supreme court has explained that "[t]he mere fact that certain language or expressions are used in the opinions of this Court to reach its final conclusion does not necessarily make it proper language for instructions to the jury." *Morgan v. State,* 544 N.E.2d 143, 148 (Ind. 1989).

The trial court instructed the jury as to the general procedure it should undertake in its deliberations. Laughner finds no fault in that instruction but argues that his proposed instruction "provided a far more detailed and thorough explanation of the rights and responsibility of jurors." Reply Br. at 26. We will not underestimate the intelligence of a jury by assuming such "detail" is absolutely necessary for it to perform its job. The instructions given by the trial court on jury procedure adequately informed the jury thereon.

10. Sentence

Sentencing decisions are entrusted to the sound discretion of the trial court and will be reversed only for abuse of that discretion. *Blanche v. State,* 690 N.E.2d 709, 714 (Ind. 1998).

Laughner claims the trial court impermissibly found "aggravating circumstances that relied exclusively on material elements of the offense." Br. of Appellant at 69. Specifically, the trial court referred to "'the nature and circumstances of the case' and the fact that Laughner 'was intending sexual contact with a thirteen year old'" as aggravating circumstances. (Sentencing Tr. p. 21). Then, the trial court used these purported aggravators to offset the multiple mitigating circumstances it found.

As Laughner's cited authority explains, a presumptive sentence "assumes the underlying elements," which is the reason why it is "improper to enhance a sentence" therefor. *West v. State,* 755 N.E.2d 173, 186 (Ind. 2001). Here, the trial court did not give Laughner an enhanced sentence; it ordered him to serve the presumptive sentence. However, we believe it appropriate to examine the trial court's explanation of what it considered as aggravating circumstances because it expressly engaged in a balancing of aggravators against mitigators.

First, the trial court found that the "nature and circumstances of the case," specifically that "there [wa]s no reasonable doubt at this point that you were intending sexual contact with a thirteen year old," led it to "believe" that Laughner was "in need of correctional or rehabilitative treatment that can best be provided by commitment to a penal facility." (Sentencing Tr. p. 21). In *Mayberry v. State,* 670 N.E.2d 1262, 1271 (Ind. 1996), our supreme court explained that when applying the statutory aggravator concerning the need for treatment, the trial court must have given a "specific individualized statement of the reason why the defendant was in need of correctional or rehabilitative treatment" in a penal facility. Here, apart from its reference to facts inherent in the crime of which Laughner was committed, the trial court failed to provide the necessary explanation of *why* Laughner needed treatment in a penal facility.

The trial court also recited how Laughner's specific actions, again noting the clear inference that Laughner was "talking to a thirteen year old boy," led it to apply the statutory aggravator "that the imposition of a reduced sentence or suspension of the sentence or imposition of probation would depreciate the seriousness of the crime."

(Sentencing Tr. pp. 21, 22). As before, with the "need for treatment" aggravator, the trial court has utilized the circumstances of Laughner's crime, the attempt to solicit a child, as a statutory aggravator. Further, our supreme court has repeatedly held that the "depreciate the seriousness of the crime" aggravator applies "only when the court considers imposing a shorter sentence." *Taylor v. State,* 695 N.E.2d 117, 122 (Ind. 1998). We recognize that those decisions concern when the aggravator may *not* be used, *i.e.,* to enhance a sentence, and that there is no enhanced sentence here. Nevertheless, the trial court necessarily had to have considered this for the purpose of enhancing Laughner's sentence in order to have found it totally negated when balanced against the mitigating circumstances.

Here, the trial court ordered Laughner to serve the presumptive sentence, despite having expressly found several mitigating circumstances: that Laughner had "no history of delinquency or criminal activity," that Laughner had led "a law abiding life for a substantial period of time prior to the commission of this crime," and that Laughner's imprisonment would result in a hardship to his wife. (Sentencing Tr. p. 22). As already noted, the application of the presumptive sentence takes into account that which is necessary to constitute the crime; therefore, purported aggravating circumstances based on the material elements of the crime cannot be used to enhance a presumptive sentence. *See West,* 755 N.E.2d at 178. Further, although we find no authority directly stating such a proposition, we must conclude that that which cannot be used to enhance a sentence cannot be used to "balance" circumstances that may properly serve to reduce the sentence as mitigators.

The mitigating circumstances found by the trial court are both undisputed and supported by the record, and no permissible aggravators were found that may serve to offset those mitigators. Accordingly, we remand to the trial court for resentencing of Laughner to less than the presumptive sentence.

We affirm in part and reverse in part.

SHARPNACK, J., and BAILEY, J., concur.

APPENDIX B

Laughner v. State of Indiana,
Judgment of conviction (unpublished order, 2001)

(LOGO) ABSTRACT OF JUDGMENT
Statement form 8466
INDIANA DEPARTMENT OF CORRECTION

INSTRUCTIONS: This form must accompany the Judgment, Pre-Sentence Report and all other documents required by law, upon the commitment of the adult offender to the Indiana Department of Correction. A separate Abstract must be used for each Cause Number.

Case name THE STATE OF INDIANA VS RICHARD LAUGHNER	
Cause Number 82D020008CF00710	Court SUPERIOR
Date of sentencing 04/12/01	Presiding Judge ROBERT J. PIGMAN
Prosecutor S. LEVCO & J. FOX	Defense attorney R. KAMMEN

PART 1	The defendant was found guilty of the following crimes under the above referenced cause:				
COUNT	CRIME	CLASS	Fel.	Misd	STATUTORY OF CITATION
1	ATTEMPTED CHILD SOLICITATION	C	X		
2					
3					
4					
5					

PART 2	As a result of the above convictions, the Court has sentenced the defendant to the Department of Correction as follows. (if consecutive time is received, check only those counts which are to follow the original sentence)				
COUNT	SENTENCE YEARS/DAYS	SUSPENDED	CON. CUR	CON. SEC	With (count or cause numbers)
1	4 YRS.				
2					
3					
4					
5					

PART 3	JUDGE'S RECOMMENDATION	
Is the defendant to be returned to the Court for probation at the completion of his/her sentence? Yes (complete part 3) X No		Chief Probation Officer K. Allen Honson
Number of days confined prior to sentencing 12 DAYS	Recommended degree of security ☐ Maximum ☐ Medium ☐ Minimum ☒ No recommendation	
Additional comments and recommendations: **SEE DOCKET SHEET**		

PART 4	JUDICIAL SIGNATURE
Signature of committing Judge /s/ Robert J. Pigman	Date signed April 16, 2001

ROBERT J. PIGMAN, JUDGE

PART 5	AFFIDAVIT OF CLERK

State of Indiana) SS:
County of **VANDERBURGH**)

I, **MARSHA ABELL**, Clerk of the County, State of Indiana, do hereby certify that the foregoing is a true and complete abstract of judgment of said Court in the above entitled cause, on the date first shown on record in my office. As testimony of these facts, I sign my name and affix the seal of the court Of **VANDERBURGH** County, at my office In the City of **EVANSVILLE**
APRIL 16, 2001

Signature of Clerk

/s/ Peggy E. Dennis
Deputy Clerk

APPENDIX C

Laughner v. State of Indiana,
Order of Indiana Supreme Court, denying review

(SEAL)
Brian Bishop
Clerk

CLERK

SUPREME COURT, COURT OF APPEALS,
AND TAX COURT

STATE OF INDIANA

217 STATE HOUSE, INDIANAPOLIS, IN 46204
317-232-1930 • FAX 317-232-8365

RICHARD KAMMEN
ONE INDIANA SQUARE
SUITE 150
INDIANAPOLIS, IN 46204

Fax Number: 317-236-0404

Cause Number
82A01-0104-CR-00141
Lower Court Number:
82D020008CF710

LAUGHNER, RICHARD J. -V- STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 10/31/02

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE

PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE ALL JUSTICES CONCUR. MS

WITNESS my name and the seal of said Court,

this ST day of OCTOBER, 2002

/s/ Brian Bishop
Clerk Supreme Court,
Court of Appeals and Tax Court